FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 102 Misc.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

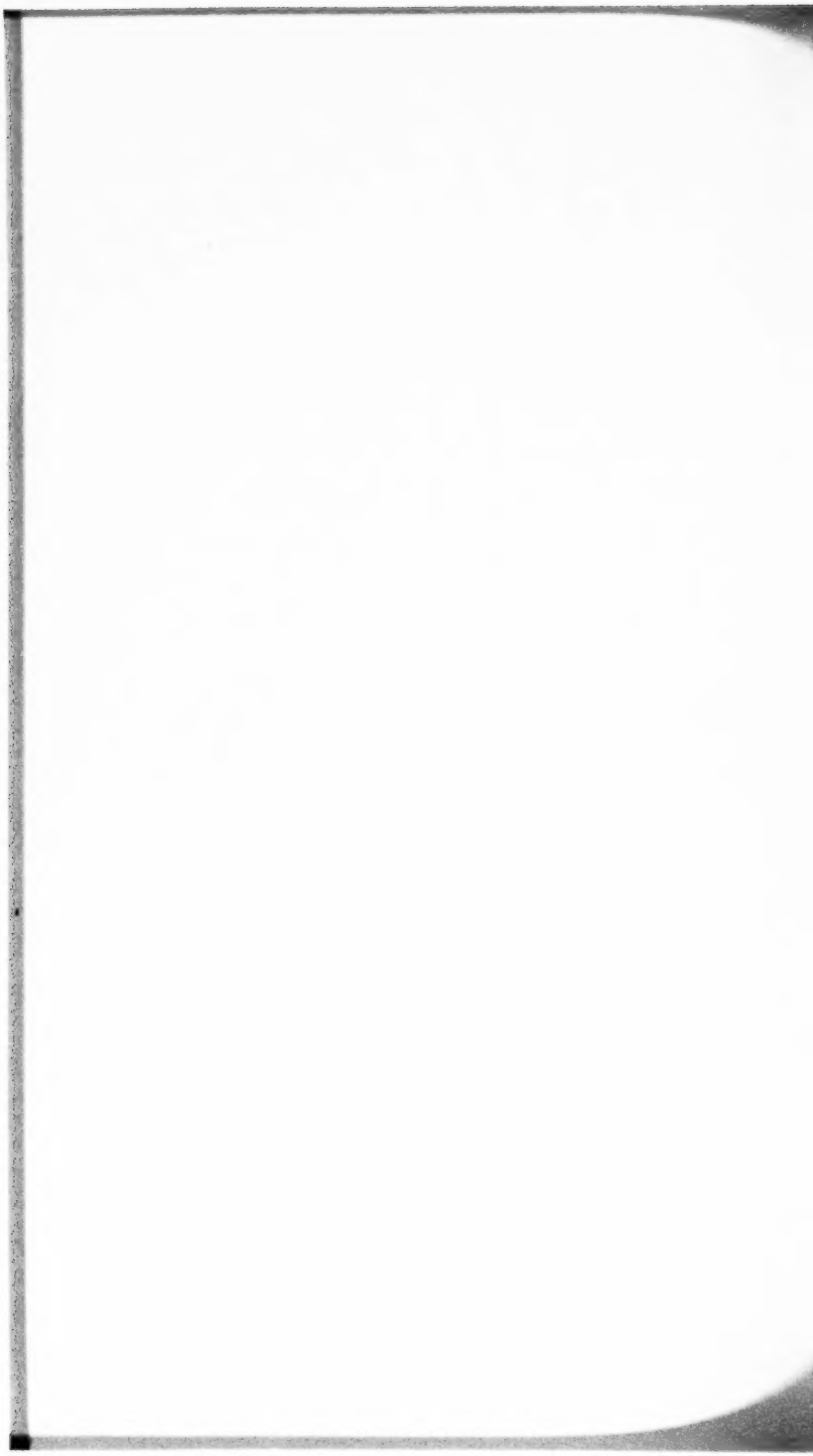
ROOT REFINING COMPANY AND SKELLY OIL COMPANY.

MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE
and
MEMORANDUM.

LESLIE NICHOLS,
1759 Union Commerce Bldg.,
Cleveland 14, Ohio.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 9647

CONTENTS.



In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 102 Misc.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY AND SKELLY OIL COMPANY.

MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE.

LESLIE NICHOLS hereby respectfully requests permission of the Court to file, as amicus curiae and in connection with these proceedings, the attached memorandum.

LESLIE NICHOLS,
1759 Union Commerce Building,
Cleveland 14, Ohio.

MEMORANDUM OF AMICUS CURIAE.

STATEMENT.

These proceedings having come to the attention of amicus curiae, he has felt his duty to this Court impels him to place before it certain matters within his knowledge which bear heavily upon the existence of a controversy with adversary parties. It is observed that the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit is challenged largely upon the ground that there were not before it "adverse parties asserting adverse legally cognizable interests." But it does not follow that there are not parties who, while not formally of record, yet are in legal effect parties to the entire proceeding and whose interests are strictly adversary.

It is the purpose of this memorandum to acquaint the Court with the fact that there is at least one other party whose rights will be materially affected and whose application for formal intervention was stayed by these proceedings.

During the times hereinafter mentioned The National Refining Company (now named William Whitman Company, Inc.), an Ohio corporation, maintained refining plants at Findlay, Ohio, and at Coffeyville, Kansas, and was engaged in the business of producing, refining and selling petroleum products, chief among them gasoline. In the years 1930 and 1931 National installed and adopted in both plants the so-called and unpatented Winkler-Koch process for cracking petroleum and refining gasoline. The Winkler-Koch process was widely used by refining companies, including Root Refining Company, Defendant Appellant in this case.

Universal Oil Products Company is a patent holding company, its stockholders during the times hereinafter mentioned being several very large oil companies, among them Standard Oil Company of California, Atlantic Refining Company and Shell Union Oil Corporation. Substan-

tially its only business was the granting to or forcing of patent licenses upon lesser members of the industry and during the 1930's and early 1940's thereby received millions of dollars of royalties. Universal had filed a score or more infringement actions, many of them directed against users of the said Winkler-Koch process.

In order to meet the extensive resources of Universal which were available for its aggressive program, substantially all of the users of the Winkler-Koch process united to form a so-called Winkler-Koch Patent Company for defense purposes. That Company was authorized to provide defense counsel for its members and was financially supported by funds contributed by its members, determined by the volume of their products. The Winkler-Koch Patent Company selected and paid counsel who defended Root in the case of *Universal Oil Products Company vs. Root Refining Company*, which is the case now before this Court.

After dismissing without prejudice an earlier case against National, Universal instituted a suit in 1935 in the United States District Court in and for the Second Division, District of Kansas, being No. 960-N In Equity on the docket of said court, and entitled *Unversal Oil Products Company vs. National Refining Company*. In the complaint Universal alleged the infringement by National (by its use of the Winkler-Koch process) of several of Universal's patents, later by stipulation reduced to the so-called Egloff patent No. 1,537,593, and the Dubbs patent No. 1,392,629, and being the same patents in litigation in the said *Root* case. To said complaint National filed answer pleading invalidity of the patents and non-infringement thereof by it.

After the decision by the United States Court of Appeals for the Third Circuit in June 1935 in *Universal Oil Products Company vs. Root Refining Company*, 78 F. 2d 991 (opinion written by Judge Davis), affirming the decree of the District Court (6 F. Supp. 763), which had upheld the

validity of the said Dubbs and Egloff patents and the infringement thereof by Root's operations (the Winkler-Koch process), Universal, on March 13, 1937, filed in the Kansas case against National an Amendment to Bill of Complaint.

In said Amendment Universal set out the above suits against Root Refining Company charging infringement of the Egloff and Dubbs patents (Nos. 1,537,593 and 1,392,629 respectively); that in 1934 the United States District Court for the District of Delaware entered decree in favor of Universal and against Root Refining Company; that from said decrees Root perfected an appeal to the Circuit Court of Appeals for the Third Circuit which on June 26, 1935 affirmed the decrees of the United States District Court for the District of Delaware in all respects in an opinion reported in 78 F. 2d 991; that thereafter a petition for rehearing was filed and denied and that a petition for writ of certiorari was filed in the United States Supreme Court and by it denied on or about October 1, 1935; that on October 30, 1935 the mandates of the Circuit Court of Appeals for the Third Circuit to the District Court in conformity with its judgments aforesaid, were handed down.

In said Amendment it was further averred that prior to the trial of Universal's suits against Root there were meetings of oil refiners using or contemplating the use of apparatus and process for cracking of oil within the purview of one or both of the patents declared upon and that the defendant was present or represented at said meetings; that said refiners, including National, selected counsel to control and conduct such suit or suits as might be prosecuted under said patents against any of them for the infringement thereof and agreed to contribute money for the defense of such suit or suits in accordance with the plan agreed upon; that National did participate in the selection of counsel or did agree to or confirm the selection which was made and did contribute to a defense fund; that the counsel so selected did have full control of the defenses which were

made in the case of *Universal Oil Products Company vs. Root Refining Company* and that the fund so created was drawn upon to defray the expenses incurred in said defense, including counsel fees. Universal in said Amendment averred that for carrying out the purposes agreed upon at said meetings there was created an organization or voluntary association known as Winkler-Koch Patent Company, for collecting the contributions to be made as aforesaid and for dispensing them and for generally carrying out the purposes of the agreement of the refiners represented thereby in connection with the defense of any suit or suits which might be or which had been brought for patent infringement, including the patents in suit; that National agreed and consented to such procedure and had an interest in said organization, Winkler-Koch Patent Company and that the latter stood in the position of its agent; that said organization did itself and through attorneys of its selection and the selection of the companies which it represented, including National, conduct and control the defenses which were made in said *Universal Oil Products Company vs. Root Refining* suits aforesaid; that said organization is now and through the same attorneys controlling and conducting the defense which is being made in this case (the Kansas case against National).

Finally, in said Amendment Universal averred that the decree entered as aforesaid in said cases of *Universal Oil Products Company vs. Root Refining Company*, and all questions which were or might have been raised on behalf of National in said suits is or are now *res adjudicata*.

National was represented in said Kansas suit by counsel selected by the Winkler-Koch Patent Company, the same counsel which defended Root in the cases of *Universal Oil Products Company vs. Root Refining Company*. Said counsel filed on behalf of National an answer to said Amendment to Bill of Complaint in which National admitted that it held meetings with other oil refiners with the sole object of making arrangements for defraying the

cost and expenses of patent litigation arising out of the use by said oil refiners of the Winkler-Koch process; admitted that it contributed money to defray the expenses of the said litigation, including the defense of said case of *Universal Oil Products Company vs. Root Refining Company*; but National denied that the decrees entered in the cases of *Universal Oil Products Company vs. Root Refining Company* and all questions which were or might have been raised on behalf of National were *res adjudicata*.

Though its answer denied the legal effect of the averments of the Amendment to Bill of Complaint and its admissions thereto made, nevertheless National, upon the advice of counsel, was constrained to abandon further contest by reason of the *res adjudicata* plea and to capitulate and accept from Universal a license agreement. Within a month following the filing of said Amendment to Bill of Complaint there followed negotiations for a license agreement during the course of which Universal's officers repeatedly alluded to the judgments it had procured in the *Root* case. The negotiations resulted in National accepting a license agreement from Universal as of April 1, 1937, and since then National has paid or incurred liability for royalties in the amount of approximately one million dollars.

On June 15, 1944, the Third Circuit Court of Appeals ordered that its judgments entered in this case on June 26, 1935 be vacated and that the mandates which were issued on October 30, 1935 be recalled and the cases restored to the argument list for reargument. From that date National withheld the payment of royalties accruing under the said patent license agreement.

Following the decision of this Court on June 10, 1946, in *Universal Oil Products Company vs. Root Refining Company* (328 U. S. 575), National filed in the District Court of the United States for the District of Delaware, Civil No. 987 on the docket of said court, a complaint entitled

"*William Whitman Company, Inc. (formerly The National Refining Company), Plaintiff, vs. Universal Oil Products Company, Defendant.*" In said complaint National recited most of the facts hereinabove contained and also set forth the proceedings in the United States Circuit Court of Appeals for the Third Circuit which had been instituted upon the application of *amici curiae* in June 1941, and which resulted in the appointment of a Master with authority to investigate and make report to that Court his findings and conclusions concerning the relationship and dealings between Universal, Morgan S. Kaufman and J. Warren Davis, and in particular whether there was in connection with the prosecution and disposition of such causes such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by the said Circuit Court of Appeals in the *Root* case on June 26, 1935. Said complaint further recited the report of said Master and his findings that the judgment of the Court of Appeals for the Third Circuit in the *Root* case was tainted with fraud and corruption and was invalid; that the said Court of Appeals thereupon issued its order accepting the Master's report and vacating its judgment entered on June 26, 1935, and recalling its mandate issued October 30, 1935. National averred in said complaint that in the manner and by the means so found by the Master and accepted by the Third Circuit, the judgment of the United States Circuit Court of Appeals had been found to have been procured by the fraud of Universal; that Universal, in its subsequent conduct with respect to National, had concealed with fraudulent intent its action and the action of its agents and attorneys in the corruption of a member of said Court of Appeals which resulted ultimately in the subsequent vacation of the judgment. National prayed for a decree of the Delaware District Court cancelling and rescinding the license agreement entered into between the parties as of April 1, 1937 and for restitution. Said action

in the Delaware District Court is now pending upon the motion of Universal, defendant therein, to strike from the complaint all recitals relating to the action of the Third Circuit Court of Appeals upon the issue of corruption.

It has come to the knowledge of *amicus curiae* that there was in course of preparation a motion by National directed to the United States Circuit Court of Appeals for the Third Circuit for leave to intervene as a party of record in this case and that such motion was to have been filed on October 13, 1947 (which was the return day set by said court in its order of June 20, 1947, by which, among other things, it directed Universal to show cause why the judgments of that court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon the said court); that the filing of said motion was interrupted and suspended by the institution of the proceedings now before this Court.

DISCUSSION.

The very briefest summarization is all that will be appropriate under the present circumstances. The primary objective of *amicus curiae* has been to place before the Court by this memorandum the fact that there *is* a genuine controversy with adversary parties "in legal effect" and that it was only the institution of these proceedings which interrupted the intervention of such parties "of record."

The petitioner, Universal Oil Products Company, has suggested to this Court that "none of the other oil companies sued in other courts by petitioner for infringement of the same patents could have a further interest"; that "the cases in which pleas of *res adjudicata* had been set up by petitioner against the other oil companies had all been dismissed"; that "the patents involved no longer had any materiality to any one since the Dubbs patent had expired in 1938 and the Egloff patent had been held in-

valid by this Court." Universal represents to this Court that no one is interested in the future of this case since Universal itself cancelled out Root by "settling" with it—the very month following that in which the Third Circuit Court of Appeals vacated its judgments because of Universal's corruption in an agreement which provided, *inter alia,* that the decree of the Delaware District Court in this case be vacated, that the complaints filed therein be dismissed and that either party might cause an order to be entered or do any other necessary or advisable thing to effectuate the foregoing without further notice to the other.

But in making those representations to this Court, as well as in failing to "cancel out" others who, Universal itself avers, were parties to the controversy in legal effect, petitioner has made an error. *Amicus curiae* is informed that National is interested, that it intends to become a party of record as well as in legal effect and that it will supply the real controversy which petitioner complains has been missing. The history of the litigation recited in the foregoing statement shows this Court the procedure by which Universal *has* profited by its judgment obtained from the Third Circuit Court of Appeals and also shows the procedure by which it *hopes* to retain the profits. *If* it did obtain the judgment in the infamous manner which has been charged, it certainly reaped the benefit thereof by its subsequent conduct toward National. It charged that by reason of facts which National was forced to admit, National was *legally estopped* from further defenses against the Dubbs and Egloff patents because National was in legal effect *a real party* in the *Root* case and was bound by the judgment of the Third Circuit Court of Appeals therein. Whether or not National's counsel was right in surrendering to that charge (and that counsel was right was actually so held by the District Court for the Northern District of Illinois in a similar *res adjucata* plea in the case of *Universal Oil Products Company vs.*

Winkler-Koch Engineering Company, 27 F. Supp. 161 (1939)), Universal nevertheless achieved its objective to force payment of tribute to the patents. Even in the Delaware case now pending wherein National prays for rescission of the license agreement because the Third Circuit Court of Appeals vacated its 1935 judgment upon the ground of Universal's fraud, Universal has filed a motion to strike the allegations from the complaint and on the very ground that National was not a party to the proceedings in the *Root* case. It would appear that when it is to Universal's advantage to plead that National was a party, it does so; but when of greater advantage to plead that National was not a party, it does that. But the license to National was procured, and royalty paid thereunder, on Universal's charge that National *was* a party.

Amicus curiae suggests to this Court that the petitioner, having used its judgment to its great profit, now seeks to insulate itself from retribution by pleading that "there is no controversy." It is respectfully suggested that the interests of justice would be well preserved if this Court, whatever may be its decision, affords opportunity for parties "in legal effect" to become actual parties of record and thus complete such controversy as will afford the lower court unquestionable jurisdiction for its contemplated procedure.

Respectfully submitted,

LESLIE NICHOLS.

Copies of this Motion and Memorandum have been delivered to all counsel of record.

LESLIE NICHOLS.